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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

STÉPHANE BOURCIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION DES ACTIONS DE CARBON;
Petitioners

vs.

GENERAL MOTORS CORPORATION, et al.
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. § 1291 when the basis for dismissal is that the claims must be arbitrated?

2. Whether the Federal Arbitration Act effects a partial repeal of 28 U.S.C. § 1291 by prohibiting appeal of some final judgments of district courts when they are based upon the holding that petitioners' claims must be arbitrated?

PARTIES

Petitioners Stéphane Bourcier de Carbon and Société Civile de Gestion des Actions de Carbon[1] (the "Holding Company") were Plaintiffs-Appellants before the Court of Appeals. Respondents General Motors ("GM") and its subsidiary Delphi Overseas Corporation ("DPOC") were Defendants-Appellees before the Court of Appeals. When petitioners commenced their derivative action in the District Court on behalf of Société Française des Amortisseurs de Carbon, S.A. (the "De Carbon Company" or "De Carbon"), petitioners[2] owned 40% of De Carbon and Respondents (through DPOC) owned 60% of De Carbon.

Both petitioner Holding Company and De Carbon are French corporations based in France and petitioner Stéphane Bourcier de Carbon is a French citizen residing in France. Respondents are both United States corporations based in the United States.

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[1] Petitioner Société Civile de Gestion des Actions de Carbon does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

[2] Stéphane Bourcier de Carbon is a shareholder of De Carbon, through his father's estate, and of the Holding Company.

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Committee on the Judiciary, Section by Section Analysis on S 1482, 100th Congress, 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988 12

I. OPINIONS BELOW

The opinion of the Court of Appeals (A19)[3] is unreported. The opinions of the District Court (A1 – A18) are unreported.

II. BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered judgment (A19) on April 24, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for writ of certiorari is timely filed. S.Ct. Rule 13.1.

III. STATUTES AND RULES

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the

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[3]Citations to the Appendix pages attached to this petition are abbreviated as "A" followed by the appropriate page numbers.

issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

IV. STATEMENT OF THE CASE

A. INTRODUCTION

Several of the Circuits are irreconcilably split (4 to 3) on the question of whether a district court's final judgment of dismissal is an appealable order under 28 U.S.C. § 1291 when the basis for dismissal is that plaintiffs' claims must be arbitrated. The Third, Sixth and Tenth Circuits hold that such dismissals present appealable final judgments, *see, e.g., Armijo v. Prudential Ins. Co. of Am.*,72 F.3d 793 (10th Cir. 1995); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990); and *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991), whereas the Fifth, Seventh, Eighth and Ninth Circuits hold they lack jurisdiction over appeals from most orders of dismissal in deference to arbitration even if the order completely ends the district court litigation. *See, e.g., Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994); and

McCarthy v. Providential Corp., 122 F.3d 1242, 1244, 1245 (9th Cir. 1997).

This case thus presents a clear and irreconcilable conflict among the Circuits on important questions of federal appellate jurisdiction and procedure and the interrelationship between two statutes. Here, the court below merely cited its own recent split decision in *McCarthy* (petition for writ of certiorari filed May 26, 1998) to reiterate that a final judgment compelling arbitration was not appealable under 28 U.S.C. § 1291 because § 16(a)(3) and (b)(2) of the Federal Arbitration Act ("FAA") — which preserves appeals of final decisions — purportedly renders the judgment below interlocutory and nonappealable.

B. THE FACTS NECESSITATING PETITIONERS' COMMENCEMENT OF THEIR ACTION IN THE DISTRICT COURT

De Carbon invented and patented a monotube shock absorber designed for high performance vehicles which is generally recognized as the best in the world. Petitioners commenced a shareholder derivative action on behalf of De Carbon, pleading both direct and derivative claims arising from violations of United States racketeering, antitrust and trademark laws as well as state law claims of fraud, breach of fiduciary duties, theft of trade secrets, conversion and conspiracy. More particularly: petitioners alleged that respondents acquired De Carbon's patented technology and related assets by fraudulently representing to the De Carbon family that defendants' acquisition of control of De Carbon was for the purpose of giving the De Carbons access to the United States market. These false representations were made by GM executives from their United States offices by means of U.S. mail and wire in violation of 18 U.S.C. §§ 1341 and 1343. Petitioners further alleged that, once respondents acquired control of De Carbon, they stole De

Carbon's technology as part of their plan to monopolize the United States market — exporting all of De Carbon's patented technology, knowhow and trade secrets from Normandy, France to GM's facilities in the United States. De Carbon's stolen technology was then used by respondents to build a plant in Dayton, Ohio for the manufacture of counterfeit shock absorbers which respondents made, used, advertised and sold in the United States market in violation of the Lanham Act.

In February 1995, petitioners sought to have the French courts initiate an investigation of respondents' misconduct. Respondents opposed the investigation, claiming that petitioners' allegations were subject to arbitration.[4] That claim was ultimately rejected by three French courts — the Commercial Court of Louviers in March 1995, the Court of Appeals of Rouen in July 1995 and the Supreme Court of France in October 1997 — on the grounds that petitioners' claims were not arbitrable. Because of these numerous French court rulings and because respondents' tortious acts were committed by United States corporations in the United States for the purpose of harming United States commerce, petitioners were compelled to commence this action in a United States court.

C. THE DISTRICT COURT

Petitioners commenced their action in the District Court for the Northern District of California on December 30, 1996. To preserve their derivative standing under Federal Rule of Civil Procedure 23, petitioners moved for a preliminary injunction on February 7, 1997 to prevent respondents from consummating their plan to acquire the Holding Com-

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[4]The agreements by which DPOC acquired 60% of De Carbon's stock provided the agreements would be governed by French law and that any disputes concerning them or their breach were subject to arbitration in Paris, France.

pany's remaining 40% shareholder interest in De Carbon pending trial. Respondents countered with, *inter alia*, a motion to dismiss all of petitioners' claims, asserting that petitioners' claims were subject to arbitration pursuant to the FAA, 9 U.S.C. §§ 1-16 and §§ 201-208.

Petitioners responded that both French law (chosen by the parties to govern construction of their contract) and United States law precluded French arbitration of U.S. tort law claims (i.e., the Sherman Act, the Lanham Act and RICO) between nonparties to the contract (i.e., GM and De Carbon). On June 10, 1997, the District Court nonetheless entered a dismissal with prejudice on all of petitioners' claims, declaring that "all of plaintiffs' claims against all defendants" were arbitrable. *See* A9. This dismissal was, in legal effect, a final judgment[5] that disposed of all claims of all parties. On June 24, 1997, petitioners filed an expedited motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The District Court expressly treated it as a motion for reconsideration of a final judgment pursuant to Federal Rule of Civil Procedure 60, declaring "FRCP 60(b) governs the reconsideration of *final* orders" (A16; emphasis added), and denied petitioners' motion on July 3, 1997. To preserve their standing on appeal, petitioners requested the court to enjoin respondents' acquisition of just five shares of De Carbon stock pending appeal. Although denying petitioners' request, the District Court conditioned its denial upon a stipulation by the parties that would ensure the preservation of petitioners' standing "pending appeal of its Dismissal Order." Clearly, the Dis-

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[5]Federal Rule of Civil Procedure 54(a) provides that " 'judgment' as used in these rules includes a decree and any order from which an appeal lies." Accordingly, an order — such as an order of dismissal — may be a judgment. *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 fn. 4, 98 S.Ct. 1117, 1120 fn. 4 (1978).

trict Court meant its judgment of dismissal with prejudice to be "final" and appealable.[6]

D. THE COURT OF APPEALS

Petitioners appealed the District Court's judgment to the Ninth Circuit. They contended their claims were not subject to arbitration because (1) the arbitration clause was not applicable to De Carbon's claims against GM since neither was a party to the arbitration clause; (2) the arbitration clause was not applicable to petitioners' United States tort law claims; and (3) enforcement of arbitration under these circumstances would result in a forfeiture of petitioners' Sherman Act, RICO and Lanham Act claims — a result which this Court said it "would have little hesitation in condemning" as "against public policy." *Mitsubishi Motors Corp. v. Soler Chrysler & Plymouth,* 473 U.S. 614, 637 fn.19, 105 S.Ct. 3346, 3359 fn.19 (1985); *see also, Vimar Sugeros y. Reasegueros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 540, 115 S. Ct. 2322, 2330 (1995); *The Bremen v. Zapata Offshore Co.,* 401 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972).

After petitioners filed their notice of appeal from the District Court's judgment, the Ninth Circuit issued its split decision in *McCarthy.* In a case of first impression for that Circuit, the Court of Appeals there held that a final order dismissing an action in favor of arbitration is "interlocutory" under 9 U.S.C. § 16(a)(3) and (b)(2) whenever the arbitration issue is "embedded" in a "substantive" action. On April 6, 1998, respondents filed a motion to dismiss petition-

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[6]This is so even though the District Court's judgment was not set forth on a separate document, as prescribed by Federal Rule of Civil Procedure 58. It is now well established that a judgment set forth on a separate document is not a prerequisite to appellate jurisdiction. *See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 384, 387-88, 98 S.Ct. 1119-20, 1121 (1978); *see also U.S. v. Nordbrock,* 38 F.3d 440, 442 fn.1 (9th Cir. 1994).

ers' appeal based on *McCarthy*. On April 13, 1998, petitioners filed their opposition, stating the District Court's judgment of dismissal of all claims with prejudice was final and appealable under 28 U.S.C. § 1291 and 9 U.S.C. § 16. On April 24, 1998, a motions panel of the Court of Appeals — which included the *McCarthy* panel majority — cited themselves in dismissing petitioners' appeal here: "Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See* 9 U.S.C. § 16(b)(2); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997)". A19.

V. REASONS WRIT SHOULD BE GRANTED

A petition for writ of certiorari was filed in *McCarthy* in May 1998. Because the decision of the Ninth Circuit here was based solely on *McCarthy* and two of the judges here also rendered the majority opinion in *McCarthy*, this petition is at least as needful of review as *McCarthy* is.[7] Both the decision below and *McCarthy* warrant this Court's review because several courts of appeal are completely at odds on an important question of federal appellate jurisdiction and procedure: whether a complete dismissal of plaintiff's action on the ground that it should be arbitrated is an appealable order. Stated differently, the courts of appeal are divided over the interplay between two frequently invoked federal statutes, i.e., whether 9 U.S.C. § 16(a)(3) and (b)(2) has effected an implied partial repeal of the grant of appellate jurisdiction over final judgments given by 28 U.S.C. § 1291.

Section 1291 provides that federal "courts of appeal . . . *shall have jurisdiction of appeals from all final decisions* of the district courts of the United States." 28 U.S.C. § 1291 (emphasis added). A "final decision" is one

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[7] At a minimum, if certiorari is granted in *McCarthy*, petitioners request that a decision here be held over until a final decision is reached in *McCarthy*.

that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233, S.Ct. 631, 673 (1945). An order of involuntary dismissal of an action is considered final and thus immediately appealable. *See United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 fn.1, 69 S.Ct. 824, 825 fn.1 (1949); *Montes v. United States,* 37 F.3d 1347, 1350 (9th Cir. 1994). Here, the District Court held that all of plaintiffs' claims against all defendants were arbitrable and therefore dismissed the entire action (*see* A1) — not merely the complaint — on that basis. Indeed, plaintiffs' claims were "dismissed with prejudice." A9. That complete relief was precisely what respondents sought.

The FAA also allows appeals from "final decisions": Section 16(a)(3) provides for appeals from "a final decision with respect to an arbitration that is subject to this title," 9 U.S.C. § 16(a)(3), while Section 16(b)(2) forbids appeals from "interlocutory" orders. 9 U.S.C. § 16(b)(2). To be consistent with established doctrines of appealability under 28 U.S.C. § 1291, a dismissal with prejudice on the ground of arbitrability, such as that entered here, should be considered a final decision under the Federal Arbitration Act.[8] Such a dismissal, in contrast to a stay, operates "as an adjudication on the merits" (*see* Federal Rule of Civil Procedure 41(b)), leaving nothing further for the court to do. The Third, Tenth, and Sixth Circuits have interpreted the FAA in this way — in harmony with § 1291. Yet the Fifth, Seventh, Eighth and Ninth Circuits apparently believe that § 16(b)(2) of the FAA partially overrides § 1291.

The questions presented here pose important considerations of judicial certainty, the administration of justice, the

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[8] Whether this case properly involves an arbitration subject to the Federal Arbitration Act is one of the issues raised by the appeal that was dismissed by the Ninth Circuit.

proper accommodation of two federal statutes, the First Amendment right to petition for redress, due process, and the right to seek effective and timely appellate review of erroneous decisions dismissing claims. The division between the Fifth, Seventh, Eighth and Ninth Circuits on the one hand and the Third, Sixth and Tenth Circuits on the other is firmly entrenched and cannot be resolved without direction by this Court — the "ultimate expositor of the meaning of the federal constitution and statutes."[9]

A. THE COURTS OF APPEALS ARE DEEPLY SPLIT

As noted above, the Third, Sixth and Tenth Circuits hold that final dismissal of an action in deference to arbitration is appealable under 28 U.S.C. § 1291. In *Arnold,* 920 F.2d 1269, the Sixth Circuit held that it had jurisdiction to hear an appeal of a district court's order directing the parties to proceed to arbitration, even though the arbitrability issue was not independent of the securities violations alleged in the underlying suit. *Id.* at 1275-76. The court offered two justifications for the result: First, the district court's order was not "interlocutory," having dismissed the complaint "in its entirety" while denying defendants' motion to stay the action pending arbitration as "moot." *Id.* at 1275. Second, the court found the FAA's legislative history "dispositive" as the Senate Committee on the Judiciary had explicitly stated when amending the Act in 1988, "Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration . . . or a *final judgment dismissing an action in deference to arbitration.*" *Id.* at 1274-75

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[9] Arthur D. Hellman, *The Supreme Court, The National Law, And The Selection Of Cases For The Plenary Docket,* 44 U. Pitt. L. Rev. 521, 522 (1983).

(emphasis in original).[10] As the Senate Committee specifically observed, these appeals "preserve the general policy that appeal should be available when there is nothing left to be done in the district court."[11]

The Tenth Circuit similarly held that it had jurisdiction under Section 1291 to hear an appeal of a final order compelling arbitration in *Armijo,* 72 F.3d at 797. Again, the decision turned on the fact that the district court compelled arbitration and *dismissed* the action rather than *ordering a stay* of the proceedings. *Id.* Hence the district court's order granting defendants' motions was "clearly a final order, permitting" the Tenth Circuit to exercise jurisdiction. *Id.*

Four other Circuits have refused to acknowledge the differences between stays and dismissals in the context of orders compelling arbitration.[12] The Ninth Circuit followed the Fifth and Eighth Circuits in holding that even a final dismissal and entry of judgment in favor of arbitration is not "final" under Section 1291 unless the motion to compel arbitration is the only claim in this case. The decision of the panel majority in *McCarthy* turned on its belief that, when the arbitration issue is "embedded", all orders compelling arbitration — even patently final orders like that entered here — are deemed "interlocutory." *McCarthy,* 122 F.3d at 1244.

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[10]Quoting *Committee on the Judiciary, Section by Section Analysis on S1482,* 100th Congress, 2d Sess., 134 Cong. Rec. S16284, Oct. 14, 1988 (emphasis added).

[11]*Id.* (quoting *Committee on the Judiciary, supra* at S16309).

[12]The difference between a stay and a dismissal is significant. A dismissal requires the party who seeks the aid of the court to file a new action, exposing the party to statute of limitations dangers and other procedural hazards. *Carnation Co. v. Pacific Westbound Conf.,* 383 U.S. 213, 222-23, 865 S.Ct. 781, 787 (1966).

Part of the confusion among the Circuits over this question stems from a perceived distinction that has somehow evolved within some Circuits between "independent" and "embedded" motions to compel arbitration. "Independent" proceedings have been characterized as lawsuits in which the sole claim before the court is the arbitrability of the dispute. *See, e.g., McDermott Int'l v. Underwriters at Lloyds,* 981 F.2d 744, 747 (5th Cir. 1993). Some courts regard a decision to compel arbitration in an "independent" proceeding as reviewable on appeal under 9 U.S.C. § 16(a)(3). *Id.* "Embedded" proceedings have been characterized as those actions in which a dispute over arbitrability is but part of a larger dispute before the court. *See, e.g., Filanto, S.P.A. v. Chilewich Int'l Corp.,* 984 F.2d 58, 60 (2d Cir. 1993). But the FAA does not speak of either "embedded" or "independent" proceedings, nor has this Court ever spoken of such a dichotomy. The distinction has gradually crept into the decisions of a few lower courts without much analysis. A decision *not* to compel arbitration in an "embedded" situation is understandably not, in and of itself, appealable.[13] But some courts have extended this principle much further, holding that an order *compelling* arbitration in an "embedded" proceeding is also not appealable even if it includes a final order of dismissal with prejudice. *See, e.g. Altman Nursing,* 84 F.3d at 772; and *Napleton,* 138 F.3d at 120.[14] Other courts disagree, relying on Section 1291.[15]

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[13] *See, e.g., Gammaro,* 15 F.3d at 95.

[14] For a thoughtful criticism of this confusing distinction, see Circuit Judge Wood's dissent in *Napleton* at p. 1216 and Circuit Judge Pregerson's dissent in *McCarthy* at pp. 1246-49. Circuit Judges Posner, Easterbrook, Cummings, and Rovner voted with Judge Wood for a rehearing *en banc* of the split decision in *Napleton,* suggesting they also were troubled by this artificial basis for denying appeals from dismissals on arbitration grounds.

[15] *See Armijo,* 72 F.3d at 797; *Arnold,* 920 F.2d at 1276.

The two-judge majority in *McCarthy* (and consequently the same judges' ruling here) followed *Gammaro,* 15 F.3d at 95-97, in which the Eighth Circuit held that it lacked jurisdiction over an appeal from what it called an interlocutory order compelling arbitration. *Id.* at 94. The Eighth Circuit refused to consider plaintiff's separate argument that jurisdiction existed under 28 U.S.C. § 1291, explaining that "our construction of 9 U.S.C. § 16 precludes that argument." *Id.* at 96. In effect, the Eighth Circuit held the Federal Arbitration Act operates as a partial repeal of 28 U.S.C. § 1291, even though Section 1291 states that courts of appeals "*shall* have jurisdiction" over *"all"* final decisions of the district courts of the United States. 28 U.S.C. § 1291 (emphasis added). The Eighth Circuit's holding, of course, contravenes the maxim that "legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, absent a clearly expressed congressional intention to the contrary." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 109, 111 S.Ct. 2166, 2170 (1991).

The Fifth Circuit in *Altman Nursing* likewise rejected *Arnold* and followed *Gammaro. See Altman Nursing,* 84 F.3d at 771 (criticizing *Arnold*). Like *Gammaro,* the Altman Nursing panel was not swayed by the fact that the underlying order completely ended the litigation and therefore constituted an appealable final order: "We disagree .... An order involving an embedded proceeding is *always* an interlocutory order; an order involving an independent claim is *always* final."[16] *Id.* (emphasis added). There is plainly an irreconcilable division among the circuits.

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[16]The other decisions cited by the majority in *McCarthy* do not reach the question presented, as they do not involve dismissals or judgments. For example, in *American Cas. Co. v. L-J, Inc.*, 35 F.3d 133 (4th Cir. 1994), the Fourth Circuit noted that the district court's order was interlocutory and nonappealable because it had "*stayed* the litigation."

The decision below and in *McCarthy* (as well as those of the Fifth, Seventh and Eighth Circuits) appear to be inconsistent with this Court's jurisprudence regarding the plain meaning of Section 1291. This Court recently reaffirmed the plain and simple meaning of finality under that statute in *United States v. Jose,* 519 U.S. 54, 117 S. Ct. 463 (1996), when it reversed the Ninth Circuit's dismissal of an appeal for lack of jurisdiction and held that the Ninth Circuit had improperly injected a different concept (ripeness) into its jurisdictional analysis. As this Court stated, "[f]inality, not ripeness, is the doctrine governing appeals from district court." *Id.* at 465.

Here, as in *McCarthy,* the Ninth Circuit has ignored the plain statutory text of both Section 1291 and the FAA. If Congress intended the FAA to modify the meaning of "final decisions" under Section 1291, it would have said so. *See Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164, 177, S.Ct. 1439, 1448 (1994) (Congress knows how to place express language in statutory text).

Id. at 138 (emphasis added). Another Fourth Circuit decision, *Stedor Enter., Ltd. v. Armtex, Inc.,* 947 F.2d 727 (4th Cir. 1991), appears to hold that the FAA does not undermine Section 1291 appellate jurisdiction over final orders because Congress did not define the terms "interlocutory" or "final" in the FAA. *Stedor* concludes that Section 16(a)(3) of the Act requires "courts to *continue* the prior, settled usage" of the term "final" decision; i.e., "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Stedor,* 947 F.2d at 731 (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633 (1945)) (emphasis added). Similarly, *Filanto* held an order compelling arbitration nonappealable because the district court *specifically* "declined to dismiss the complaint." 984 F.2d at 61. In *Filanto* the Second Circuit acknowledged that it was "arguable" that, had the complaint been dismissed with finality, "an appeal would be immediately available." *Id.* at 61 n.3.

B. THE QUESTIONS PRESENTED ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE AND TO THE RIGHTS OF PLAINTIFFS TO SEEK EFFECTIVE AND TIMELY REVIEW OF ERRONEOUS DISMISSALS OF COMPLAINTS

The Court has granted certiorari when an intercircuit conflict exists and *"a considerable number of suits are pending in the lower courts which will turn on [its] resolution." See Massachusetts Trustees of Eastern Gas & Fuel Assoc. v. United States,* 377 U.S. 235, 237, 84 S.Ct. 1236, 1239 (1964) (emphasis added). That rationale warrants certiorari here. It is well known that arbitration clauses are becoming more prevalent in contracts of all types.[17] As a direct result, disputes over arbitrability also continue to grow. While arbitration disputes might occasionally be presented on a petition to compel arbitration under 9 U.S.C. § 4 *et seq.,* (hence "independent") , there is every reason to believe they are comparatively rare and that arbitration is virtually always "embedded" as a defense to a previously instituted court action. Increasingly, civil actions are thus met with motions to dismiss or stay based upon an asserted obligation to arbitrate, with resulting confrontation on that and other issues. Indeed, hundreds of these disagreements arise each year, and several have reached this Court in recent years.[18]

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[17] *See, e.g.,* Harold Brown, *Alternative Dispute Resolution: Realities and Remedies,* 30 Suffolk U. L. Rev. 743, 745 (1997) (noting increasingly common arbitration clauses in agreements involving, *inter alia,* stockbrokers, banks, franchisors, and employer/employee relationships).

[18] *See, e.g., First Options v. Kaplan,* 514 U.S. 938, 115 S. Ct. 1920 (1995); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647 (1991); *Volt Information Service v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248 (1989).

The persistence of this confusion regarding the appealability of a judgment of dismissal on arbitration grounds will, until resolved by this Court, only serve to thwart the policy in favor of arbitration by discouraging parties from including arbitration clauses in their contracts. For example: if a court action is wrongly dismissed on arbitration grounds and plaintiff is unable to appeal and yet the arbitration panel subsequently holds the dispute is not arbitrable (as will certainly occur here), what then? Since there will be no action pending in the District Court or the Court of Appeals, where does plaintiff seek review of the arbitrator's disclaimer of jurisdiction? Does the statute of limitations run on plaintiffs' claim in the interim? *See, e.g., Carnation Co. Pacific Westbound Conf.*, 383 U.S. 213, 222-223, 86 S.Ct. 781, 787 (1966). (For other problems resulting from this appellate confusion, see discussion in *Napleton,* 138 F.3d at 1217.) There is no good reason why anyone — faced with such uncertainty and delay over appellate review concerning the proper forum to hear his claim — should waive his First and Seventh Amendment rights to a jury trial of his grievance in favor of a contract requiring arbitration. Only this Court, with its unique responsibility for overseeing the lower federal courts, can resolve this burgeoning conflict among numerous Circuits over the interpretation of two federal statutes without compromising one's Constitutional rights of petition and due process. Harmonization of the statutes and unification of practice in the federal courts, so as to ensure a prompt and fair hearing to litigants, is needed.

VI. CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Dated: July 21, 1998 Respectfully submitted,

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No. C-96-4670 SI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

STEPHANE BOURCIER DE CARBON, et al.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, et al.,
Defendants.

(Entered June 10, 1997)

ORDER OF DISMISSAL

Filed June 9, 1997
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

On April 4, 1997, the Court heard argument on defendants' motions to dismiss and plaintiffs' motion for a preliminary injunction. Having considered the arguments of counsel and the papers submitted, the Court hereby dismisses this action and denies plaintiffs' motion for preliminary injunction.

BACKGROUND

Plaintiffs Stephane Bourcier de Carbon and the Societe Civile de Gestion des Actions de Carbon (the "Holding Company") are the minority shareholders of the Societe Francaise des Amortisseurs de Carbon S.A. (the "De Carbon Company"), a French corporation which manufactures monotube shock absorbers for use in automobile suspension systems. In 1989, General Motors Corporation ("GM"),

through its wholly owned subsidiary Delphi Overseas Corporation ("DPOC"), acquired 60% of the stock of the De Carbon Company. The remaining 40% of the company's stock is still owned by the De Carbon family[1] via the Holding Company.

The acquisition at issue was effected by a series of agreements signed by DPOC, on the one hand, and the individual De Carbon family members on the other, in late 1987 and early 1988. The agreements include a Pre-acquisition Agreement, Share Acquisition and Subscription Agreement, Shareholders Agreement, and Supplemental Shareholders Agreement (collectively the "Stock Transfer Agreements").

Significant disputes have arisen between the De Carbon family members, DPOC and the GM defendants, relating in large part to the value to be assigned to the remaining 40% of the De Carbon Company stock still held by the individual family members. Both litigation in the French commercial courts, concerning appointment of an evaluator for the shares, and in various International Chamber of Commerce ("ICC") arbitration proceedings in Paris, France, have already taken place.

Plaintiffs filed this action in the Northern District of California [2]against GM, Delco Chassis Division of GM,

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[1] The members of the De Carbon family involved in this matter are Christian Bourcier de Carbon, the now-deceased founder of the company, and his sons Axel Bourcier de Carbon, Stephane Bourcier de Carbon and Roland Bourcier de Carbon. The individual family members were parties to the written stock transfer agreements in dispute.

[2]The complaint alleges that venue in this district is proper because defendants "transact business" here. The General Motors defendants trasact business virtually everywhere in the United States. Upon inquiry at oral argument, counsel for plaintiffs indicated that there was no particular case-related factual connection to the Northern District of California.

Delco Chassis Systems Division of GM, DPOC, and the De Carbon Company itself on December 30, 1996. The complaint alleges both direct and derivative claims of trademark infringement and antitrust and RICO violations, as well as California state law claims including breach of fiduciary duty, conversion, theft of trade secrets and fraud.

Presently before the Court are plaintiffs' motion for a preliminary injunction, seeking to enjoin defendants from proceeding with the final acquisition of the remaining shares of stock in the De Carbon Company in accordance with the Stock Transfer Agreements; and defendants' four separate motions to dismiss, based on: 1) the Federal Arbitration Act; 2) forum non conveniens; 3) lack of personal jurisdiction over the nominal defendant De Carbon Company; and 4) failure to join an indispensable party.

DISCUSSION

A. *Federal Arbitration Act.*

Defendants seek dismissal of plaintiffs' individual (direct) claims pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208. Defendants contend that all of plaintiffs' claims fall within the contractual arbitration clauses which are part of the Stock Transfer Agreements signed by plaintiffs and DPOC, and that these disputes must be submitted to an International Chamber of Commerce (ICC) arbitration in Paris, France pursuant to the Agreements.

Plaintiffs contend that most of their claims, including the RICO, antitrust, trademark infringement, false advertising and conversion claims, are not arbitrable because (1) of all the defendants named, only defendant DPOC was a party to the agreements containing arbitration clauses; and (2) the claims are unrelated to the Stock Transfer Agreements and thus are not within the scope of arbitration clauses.

The relevant language of the Stock Transfer Agreements reads:

> 23. *Governing Law and Jurisdiction*
>
> 23.1 This Agreement and all attachments and Appendices shall be governed by the laws of France.
>
> 23.2 In the event of any dispute or difference arising out of or relating to this Agreement or the breach thereof . . . the disputes or differences shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules. The site of arbitration shall be Paris (France).

(Lecarpentier Decl., Exh. B1, p. 16-17.) In light of this broad language, which appears in each of the four stock transfer agreements, defendants assert that all of the De Carbons' claims constitute "disputes or differences arising out of or relating to" the agreements or the breach thereof, and thus are within the scope of the arbitration clause.

The Federal Arbitration Act includes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 201. This chapter of the Act codifies what is recognized as an "emphatic federal policy in favor of arbitral dispute resolution, [and] . . . that federal policy applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 631 (1985); *Sherk v. Alberto-Culver Co.,* 417 U.S. 506, 518-19 (1974). The Supreme Court has also upheld the principle that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983).

Following the language of the Convention, the First and Tenth Circuits have employed a four-part inquiry for deter-

mining whether litigants should be compelled to arbitrate a particular dispute under the Federal Arbitration Act:

> (1) is there an agreement in writing to arbitrate the subject of the dispute?
>
> (2) does the agreement provide for arbitration in the territory of the signatory of the Convention?
>
> (3) does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
>
> (4) is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

Riley v. Kingsley Underwriting Agencies Ltd., 969 F.2d 953, 959 (10th Cir. 1992), citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

In the present case, there is (1) an agreement in writing between the parties which calls for arbitration of any dispute or difference arising out of or relating to the agreement; (2) the agreement provides for arbitration in France which is a signatory country to the Convention; (3) the legal relationship between the parties is commercial; and (4) French citizens are parties to the agreement.

Plaintiffs argue that the current dispute involves GM's theft of trade secrets, false advertising, antitrust violations, trademark infringement, etc., which are not "disputes or differences arising out of or relating to" the agreements or the breach thereof, and which have not yet been litigated in the French judicial and arbitral proceedings.

However, the transfer agreements include sections addressing trademark licenses and technology transfer agreements, and include covenants concerning acting in "good faith" and in the best interests of the De Carbon Company. Thus, plaintiffs' claims of trade secret violations and trade-

mark infringement relate directly to the terms of the Stock Transfer Agreements. In addition, plaintiffs' RICO claims allege an ongoing scheme to "raid" De Carbon Company of its assets, trade secrets, market shares, etc., all in alleged violation of defendants' duty of loyalty and good faith under the stock transfer agreements.

Language as expansive as that used in the present arbitration agreement has consistently been construed broadly by the Supreme Court. Such language has been construed to reach antitrust claims (*see Mitsubishi,* 473 U.S. at 636-37) and fraud claims (*see Prima Paint v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 399-400 (1967)).

It is clear from the Stock Transfer Agreements that the individual plaintiffs and DPOC are obligated, as signatories to the Stock Transfer Agreements, to arbitrate any disputes related to the Agreements, and the Court finds that the claims alleged in this action by plaintiffs against DPOC arise out of or relate to the terms of the Stock Transfer Agreements and are therefore subject to arbitration pursuant to the arbitration clause of the Agreements and the Federal Arbitration Act.

Plaintiffs contend that even if the claims against DPOC were subject to arbitration, the claims against the other GM defendants named in this action are not arbitrable, because those other defendants were not signatories to the Stock Transfer Agreements. Plaintiffs further argue that the GM defendants are judicially estopped from asserting that the claims against them should be arbitrated, because GM's position during the French proceedings was that the GM defendants could not be compelled to arbitrate since they — unlike DPOC — were not parties to the Stock Transfer Agreements.

The GM defendants vigorously dispute this contention, arguing that the question of the GM defendants' participa-

tion in the ICC arbitration process has never previously come up and stating that they have never taken the position that they cannot properly be joined in an ICC arbitration proceeding under the Stock Transfer Agreements. The GM defendants argue that the prior French litigation, to which they resisted being joined because they were not signatories to the Stock Transfer Agreements, was not ICC arbitration at all, but rather was French commercial court litigation concerning the identity of the appropriate evaluator. This appears, from the record presented, to be correct.[3]

The controlling law in the Ninth Circuit on the issue of whether a parent company can be bound by a subsidiary's consent to an arbitration clause is found in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). In *Manetti-Farrow*, the court held that "a range of transaction participants, parties and non-parties, should benefit from and be subject to [arbitration clauses]." *Id.* at 614, n. 5. The court went on to hold that where the alleged conduct of the non-parties is so closely related to the contractual relationship, an arbitration clause can apply to a non-party parent company. *Id.*[4]

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[3]Counsel for the GM defendants stated on the record at oral argument that the GM defendants would participate in arbitration in the French forum should this Court decide to return this action to ICC arbitration in France.

[4]Plaintiffs urge the Court to adopt the holding of the Third Circuit in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir. 1994), *aff'd*, 115 S.Ct. 1920 (1995); and *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996), *cert. denied*, 500 U.S. 953 (1996). In those cases, the Third Circuit held that a party which is not a signatory to the agreement containing an arbitration clause cannot be compelled to arbitrate pursuant to that agreement. *Dayhoff* at 1296. Plaintiffs contend that the holding in *Manetti-Farrow* is inconsistent with the Supreme Court's ruling affirming the outcome in *First Options*. However, the Court disagrees with plaintiffs' interpretation of the holding in *First Options* and follows the binding Ninth Circuit precedent on this issue.

Here, the alleged conduct of GM and its subsidiaries is sufficiently related to the contractual obligations between plaintiffs and DPOC to support a finding that the GM defendants are within the reach of the arbitration clause of the Stock Transfer Agreements.

Accordingly, the Court finds that plaintiffs' claims alleging actions by GM and its subsidiaries which were harmful to the interests of the De Carbon Company and its shareholders constitute a dispute which is related to the Stock Transfer Agreements. As such, the Court must, pursuant to the Federal Arbitration Act, dismiss plaintiffs' claims and compel plaintiffs to arbitrate the claims as previously agreed by the parties. *Mitsubishi,* 473 U.S. at 640.[5] This dismissal is conditioned upon the GM defendants' agreement, based on

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[5]Since this matter was briefed and argued, the Ninth Circuit decided *Govett American Endeavor Fund, Ltd. v. Trueger,* ____ F.3d ____, 97 CDOS 3187 (9th Cir. May 2, 1997). In letter briefs, the parties point to language in *Govett* which states that "a contract specifying the law of a foreign jurisdiction as the law controlling contractual duties cannot be used as a defense to claims of torts committed in violation of federal criminal statues" (referring to RICO) and that parties cannot "attempt by contract referring to foreign law to save from criminal or tort liability acts performed in the United States by citizens of the United States involving investments in companies in the United States." Plaintiff urges that *Govett* precludes reliance on French law in this case. Defendant responds that *Govett* does not apply here because this case involves acts in France involving an investment in a French company in France, and because this case involves a forum selection clause, not just a choice of law provision. More fundamentally, this case involves a mandatory arbitration provision, requiring that international arbitration proceedings be undertaken. To the extent that plaintiff's RICO claims are viable, because of *Govett* or otherwise, such claims are arbitrable. *Shearson/American Express, Inc. v. McMahon,* 107 S.Ct. 2332, 2345-6 (1987): "In sum, we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. [Plaintiffs] may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c)."

their representations to the Court, that they are subject to and will participate in ICC arbitration proceedings in France. In sum, on the issue of arbitration, the Court finds that all of plaintiffs' claims against all defendants are arbitrable, and finds that the GM defendants must participate in that arbitration process.

Accordingly, plaintiffs' claims against the GM defendants and DPOC are hereby DISMISSED WITH PREJUDICE.

B. *Personal Jurisdiction over De Carbon Company.*

Defendants further argue that this Court lacks jurisdiction over any derivative claims brought on behalf of the De Carbon Company, because, they contend, the De Carbon Company has insufficient contacts with this forum to justify the exercise of either general or specific jurisdiction over it by this Court.

1. *Legal Standard for Personal Jurisdiction.*

Federal courts have powers of personal jurisdiction as broad as the courts of the state in which they are located. *Omni Capital Int'l., Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 105-106 (1987); Schwarzer, Tashima & Wagstaffe, *California Practice Guide; Federal Civil Procedure Before Trial*, 3:23-24 (The Rutter Group 1997). The statutory basis for a California court's exercise of personal jurisdiction is California Code of Civil Procedure § 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

Due process requires that a nonresident defendant have minimum contacts with the forum state sufficient that exercise of personal jurisdiction does not offend notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945). *Id.* This constitu-

tional test may be satisfied by a showing either (1) that defendant's contacts with the forum are "substantial" or "continuous and systematic," *Decker Coal Co. v. Commonwealth Edison Co.,* 805 F.2d 834, 839 (9th Cir. 1986); or (2) that "there is a strong relationship between the quality of the defendant's forum contacts and the cause of action," *id.* (citing *Burger King v. Rudzewicz,* 105 S. Ct. 2174 (1985)). The burden of showing that jurisdiction is proper rests with the plaintiff. *Decker Coal,* 805 F.2d at 839; *Haisten v. Grass Valley Medical Reimbursement,* 784 F.2d 1393, 1397 (9th Cir. 1986).

Personal jurisdiction may be exercised over a foreign defendant under either one of two categories: general or specific. As the Court in *Spirits, Inc. v. Superior Court,* 104 Cal.App.3d 918, 923-24 (1980) (emphasis added) stated:

> If the non-resident's activities within California are extensive or wide-ranging or substantial, continuous and systematic, then *general jurisdiction* may be exercised as to all causes of action against the defendant, irrespective of whether the particular cause alleged has a direct connection with the defendant's activities within this state.
>
> If, however, the non-resident defendant's activities within this state are not so pervasive as to justify the exercise of general jurisdiction, then the quality and nature of defendant's activity within the state must be evaluated in relation to the particular cause of action alleged.

Three criteria are generally applied to determine the existence of specific or limited jurisdiction based upon minimum contacts:

> 1. The out-of-state defendant *purposefully directed [his] activities toward residents of the forum state* or otherwise established contacts with the forum state;

2. Plaintiff's *cause of action arises out of or results from the defendant's forum-related contacts*; and

3. The forum's exercise of personal jurisdiction in the particular case *must be reasonable.*

William W. Schwarzer, A. Wallace Tashima, and James M. Wagstaffe, California Practice Guide, Federal Civil Procedure Before Trial, ¶3:116.

2. *Contacts of the De Carbon Company with California.*

Defendants argue that there is no general jurisdiction over the De Carbon Company in California. They submit that the De Carbon Company has no offices, bank accounts, real property, employees, or customers in California; and that the company is managed and operated solely within France, by management and supervisory boards which meet and conduct business only in France. Under these circumstances, defendants argue that the De Carbon Company does not have the substantial, continuous or systematic contacts with this forum required for the exercise of general jurisdiction.

Defendants also contend that specific jurisdiction is lacking in this forum because plaintiffs' claims are wholly unrelated to De Carbon Company's froum-related activities. Defendants assert that plaintiffs do not and cannot allege that De Carbon Company performed any acts in California that give rise to or are even related to any of plaintiffs' sixteen causes of action.[6]

Plaintiffs make no argument that De Carbon Company's contacts with this forum are sufficient for the exercise of

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[6]At oral argument, plaintiffs presented evidence that there may have been a distributor of De Carbon shock absorbers in Hayward, California as recently as 1993. Even if this is so, this single contact would not change the outcome of the jurisdictional analysis. *See Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987).

general jurisdiction. However, plaintiffs do contend that the Company's contacts satisfy the requirements for the exercise of specific jurisdiction.

In order for the Court to exercise jurisdiction in a way which satisfies the requirements of due process, plaintiffs must show all of the following: (1) the De Carbon Company took some action through which it purposefully availed itself of the privilege of conducting business in California; (2) that plaintiffs' claims arise out of De Carbon Company's forum-related activities; and (3) that the exercise of jurisdiction over De Carbon Company is reasonable. *See Sher v. Johnson,* 911 F.2d 1357, 1361 (9th Cir. 1990). The requirement that plaintiffs' claims arise out of the De Carbon Company's activities in the forum is dispositive in this case.

Under *Ballard v. Savage,* 65 F.3d 1495, 1500 (9th Cir. 1995), plaintiffs must demonstrate that "but for" defendants' contacts with California, plaintiff's claims would not have arisen. On the issue of personal jurisdiction over De Carbon Company, the inquiry must be made only with regard to De Carbon Company's contacts with California. The other defendants' contracts must not be considered. The only California contact alleged is a distributor who sold De carbon shock absorbers in the state.

Plaintiffs make no specific allegations that any of their claims resulted directly from the sale of shock absorbers in California. Plaintiffs' claims primarily involve allegations that the GM defendants, along with certain directors officers and managers of De Carbon Company, devised schemes and conspired to take control of De Carbon Company and "loot" its corporate assets and technical know-how; and that the defendants attempted to create a monopoly in the United States monotube shock absorber market by squeezing out competing manufacturers including the De Carbon Company. These are broad allegations involving activities throughout France and the United States. However, none of

the allegations specifies that activities in California were the catalyst to the claims, and the complaint contains no suggestion that activities of the De Carbon Company in California form any part of the claim.

The jurisdictional analysis here is atypical, since plaintiffs, by bringing a shareholder derivative action, do not seek damages for wrongs committed by De Carbon Company, but instead name De Carbon Company as a nominal defendant in order press claims the company itself would not act upon. However, plaintiffs cite no authority for altering the jurisdictional analysis when dealing with the nominal defendant in a derivative action and the court believes itself bound by the analysis discussed above.

Accordingly, this Court finds that De Carbon Company is not subject to personal jurisdiction in this forum, and must be dismissed from this action. Moreover, upon dismissal of De Carbon Company as a defendant, the derivative action lacks an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. *Ross v. Bernhard,* 396 U.S. 531, 538 (1970). Accordingly, defendants' motion to dismiss on this ground must be GRANTED.

C. *Remaining Motions.*

1. *Preliminary Injunction.*

Plaintiffs seek a preliminary injunction "enjoining defendants, their officers, agents, servants, employees, attorneys and all those in active concert or participation with them, from proceeding with the final acquisition of the remaining shares in (De Carbon Company) which are currently held by plaintiffs, in order to prevent an irreparable loss of rights prior to a full and fair trial on the merits of this action." (Pln. Mtn for Preliminary Inj., p. 1).

In light of the dismissal of the plaintiffs' claims, the Court does not reach the merits of plaintiffs' motion for preliminary injunction, and that motion is therefore DENIED.

2. *Forum Non Conveniens.*

Defendants also move for dismissal on grounds of forum non conveniens. In light of the above findings, the Court need not and does not reach this motion.

CONCLUSION

For the above reasons and for good cause shown:

(1) Defendants' motion to dismiss pursuant to the Federal Arbitration Act is GRANTED, conditioned on the GM defendants' agreement, based on their representations to the Court, that they are subject to and will participate in ICC arbitration proceedings in France;

(2) Plaintiff's motion for preliminary injunction is DENIED;

(3) Defendant De Carbon Company's motion to dismiss for lack of personal jurisdiction is GRANTED; and

(4) The GM Defendants' motion to dismiss for failure to join an indispensable party is GRANTED.

IT IS SO ORDERED.

Dated: June 7, 1997.

/s/ SUSAN ILLSTON

SUSAN ILLSTON
United States District Judge

No. C-96-4670 SI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

STEPHANE BOURCIER DE CARBON, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION, et al.,
Defendants.

(Entered July 9, 1997)

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

Filed July 3, 1997
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

On June 9, 1997, this Court issued an Order dismissing this action in favor of arbitration pursuant to a contractual agreement by the parties. The Order also denied plaintiffs' motion for a preliminary injunction which sought to enjoin defendants from proceeding with the final acquisition of the remaining shares in the De Carbon Company currently held by plaintiffs. Plaintiffs sought the injunction to prevent the loss of their standing to bring derivative shareholder claims as part of this action.

On June 24, 1997, plaintiffs filed a motion to alter or amend the Court's judgment,[1] and Defendants' filed an opposition brief on June 27, 1997.

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[1]The Court will treat plaintiffs' request as a motion for reconsideration.

DISCUSSION

Federal Rule of Civil Procedure 60(b) governs the reconsideration of final orders. That rule permits a district court to relieve a party from a final order or judgment on grounds of

> (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud . . . of an adverse party, . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

Motions to reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking,* 825 F.2d 437, 441 (D.C. Cir. 1987). To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. *See, e.g., Kern-Tulare Water Dist. v. City of Bakersfield,* 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds,* 828 F.2d 514 (9th Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988).

Two arguments are commonly used to justify the reconsideration of an order. The first is a clear error of law by the Court or the need to prevent a "manifest injustice" from occurring. In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier. *Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir. 1985). If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.,* 762 F.2d 557, 561 (7th Cir. 1985).

The second major ground for a motion for reconsideration is that a party has produced new evidence. In order for evidence to be considered "new" for the purposes of Rule 60(b), it must meet three criteria. First, it must be of such a character that it would change the outcome of the Court's prior decision. *Fernhoff v. Tahoe Regional Planning Agency,* 622 F.Supp. 121, 122 (D. Nev. 1985). Second, it must have been undiscovered at the time of Court's original decision. *Englehard Indus., Inc. v. Research Instrumental Corp.,* 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964). Third, it could not have been discovered through exercise of reasonable diligence by the moving party. *Shiley, Inc. v. Bentley Laboratories, Inc.,* 115 F.R.D. 169, 170 (C.D. Cal. 1987); *see* Fed. R. Civ. P. 60(b)(2). if the evidence was previously available, the motion fails as a matter of law. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.,* 813 F.2d 1553, 1557-58 n.4 (9th Cir. 1987).

Plaintiffs have made no compelling arguments of clear error or "manifest injustice" in the Order of Dismissal at issue here. Moreover, plaintiffs have not produced any new evidence or cases, and have essentially made the same arguments as were made in relation to the original motions heard and decided by this Court. Accordingly, plaintiffs' motion for reconsideration is hereby DENIED.

The denial of the motion for reconsideration notwithstanding, the Court is inclined to preserve the status quo as it relates to the remaining shares of De Carbon Company Stock, pending appeal of the dismissal order so as to prevent the loss of plaintiffs' standing to litigate derivative shareholder claims. Thus, the Court requests that the parties submit further briefing as to whether the status quo with respect to the remaining shares can or should be preserved. The parties should address:

1) whether a stipulation by the parties concerning the transfer of the remaining shares would be sufficient to

preserve plaintiffs' standing should this Court's ruling be reversed on appeal; and

2) if loss of standing can only be prevented through an injunction which prevents the transfer of plaintiffs' remaining shares pending appeal, what, if any, hardship such an injunction would cause defendants. The parties shall file the supplemental briefs addressing the issues listed above on or before July 10, 1997. In order to allow time to receive and review such briefing, the parties are ordered to continue to abide by the current agreement between them which prevents transfer of the block of remaining shares in the De Carbon Company for eight additional days, to and including July 18, 1997.[2]

CONCLUSION

For the above reasons and for good cause shown:

1) Plaintiffs' motion for reconsideration is DENIED; and

2) The parties shall file supplemental briefs addressing the issues listed above; and

3) The parties are ORDERED to continue until July 18, 1997, to abide by the current agreement between them which prevents transfer of the block of remaining shares in the De Carbon Company.

IT IS SO ORDERED.

Dated: July 3, 1997.

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

[2]This agreement, which was entered into after this Court's June 9, 1997 Order, currently prevents transfer of the shares until July 10, 1997.

No. 97-16523

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANE BOURCIER DE CARBON; et al.,
Plaintiffs-Appellants,

VS.

GENERAL MOTORS CORPORATION,
a Delaware Corporation, et al.
Defendants-Appellees.

(Entered April 24, 1998)

ORDER

DC# CV 96-4670-SYI
Northern California

Filed Apr. 24, 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: BRUNETTI, RYMER and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See* 9 U.S.C. § 16(b)(2); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244-45 (9th Cir. 1997). Accordingly, the appeal is dismissed.

To the extent that appellants request that the court treat the notice of appeal as a petition for a writ of mandamus, the request is denied. *See Bauman v. United States District Court*, 577 F.2d 650, 654-55 (9th Cir. 1977).

(2)

No. 98-189

Supreme Court, U.S.
FILED
AUG 31 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

STEPHANÉ BOURCHIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION
DES ACTIONS DE CARBON;

Petitioners,

vs.

GENERAL MOTORS CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

A. Introduction

This is a forum shopping case. Petitioner Stephane Bourcier De Carbon is a French citizen, and petitioner The Societe Civile De Gestion Des Actions De Carbon (the "Holding Company") is a French company. It is owned by Stephane Bourcier De Carbon, his brothers (Axel and Roland) and the estate of their father (Christian), also French citizens. (ER 185, Tab 9)[1] Societe Francaise Des Amortisseurs De Carbon, S.A. ("De Carbon Company") is a French company, most of whose shares were owned by the Holding Company. The Holding Company transferred 60% of its, and thus the De Carbon family's, De Carbon Company shares to respondent-defendant Delco Product Overseas Corporation ("DPOC") in January 1988. (ER 211-36, 226-27) The sale took place in France, pursuant to a French contract, governed by French law.

Four and a half years ago, members of the De Carbon family exercised their right under that French contract and demanded that DPOC purchase the rest of their stock. A dispute arose almost immediately regarding the price of the stock which, by the terms of the contract, hinges on the total value of the De Carbon Company. The De Carbons pursued in France a variety of legal strategies to have the price set to their liking. The gist of their legal

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[1] References to Appellants' Excerpt of Records filed in the Ninth Circuit are preceded by "ER"; to Petitioners' Brief in Support of Certiorari by "Peti. Br."; to Appellees' Supplemental Excerpts of Record by "SER"; and to Appellees' Request for Judicial Notice by "AERJN, Ex.___."

claims has been the same all along: that DPOC and its parent, General Motors Corporation ("GM"), depressed the value of De Carbon Company by taking its technology, self-dealing, and usurping a promised opportunity for De Carbon Company to expand its North American operations.

Arbitration is the contractually prescribed mechanism – and Paris the place – for resolving those claims. Accordingly, the De Carbons have litigated them in France for years, first before a neutral evaluator, then an administrator, then an International Chamber of Commerce (ICC) arbitration panel. The De Carbons however did not succeed on the merits before those tribunals: The neutral evaluator, the administrator and his expert assistants, and the arbitrators (in all, no fewer than seven different authorities) rejected the De Carbons' claims of wrongdoing.

Having lost in France, the De Carbons came to the United States District Court for the Northern District of California in quest of a more hospitable forum, and filed this lawsuit. It makes essentially the same claims the De Carbons have pursued in France all these years: that GM took technology and corporate opportunities from De Carbon Company, and thereby depressed the value of the De Carbons' stock. That transparent effort to end-run French law, French courts and French arbitration was not well received in France; while this case was pending in the District Court, the Court of Appeal in Paris found the De Carbons had engaged in "purely a delaying tactic," rejected their appeal and awarded DPOC damages.

The District Court in California found the De Carbons' claims arbitrable, in France, as they plainly were, and directed that arbitration proceed there. Nevertheless, the De Carbons refused to proceed there, and instead appealed the District Court's interlocutory order to the Ninth Circuit, another delaying tactic. The Ninth Circuit properly dismissed that "appeal," so the De Carbons petitioned this Court for review, still another delaying tactic.

This case presents no esoteric issue regarding the interpretation of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, at 28 U.S.C. § 1291,[2] and no issue that matters at all. The Ninth Circuit adhered to the fundamental principles regarding appealability laid down by this Court and endorsed by virtually all circuit courts, and properly dismissed this interlocutory appeal. The real issue is how long petitioners can avoid doing what they promised to do – arbitrate these disputes – by "delaying tactics" that have already offended the French tribunals they have been before. This petition should be denied.

B. The Facts

1. The Sale of De Carbon Company to DPOC and the Governing Arbitration and Choice of Law Agreements

Ten years ago, in January 1988, petitioners sold a majority (60%) interest in De Carbon Company to DPOC.

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[2] Petitioners cite to 9 U.S.C. § 16(b)(2), relating to interlocutory appeals. (Peti. Br., p. 5) Actually, § 16(b)(3), relating to interlocutory appeals in international arbitrations, is applicable.

Four Stock Transfer Agreements govern the transaction: a Pre-Acquisition Agreement (ER 211-36, 226-27, Tab 10), a Share Acquisition and Subscription Agreement (ER 238-273, 270-71, Tab 10), a Shareholder Agreement (ER 275-87, 283-84, Tab 10), and a Supplemental Shareholder Agreement (ER 289-314, 306, Tab 10). Each agreement was signed by Christian, Axel, Stephane and Roland de Carbon; the Holding Company also signed the Shareholder and Supplemental Shareholder Agreements. (ER 211, 238, 275 and 289, Tab 10)

The Supplemental Shareholder Agreement entitled petitioners to "put" their remaining shares to DPOC, and so obligate DPOC to buy them. (ER 289-324, Tab 10) The shares' price would turn on De Carbon Company's value determined by a price-setting mechanism; that mechanism in effect averaged the valuations of two party experts and a third, independent, expert. (ER 192-94, Tab 9; ER 288-314, Tab 10)

Each of the Stock Transfer agreements contains these identical choice of law and arbitration clauses:

> 23. GOVERNING LAW AND JURISDICTION
>
> 23.1 This Agreement and all Attachments and Appendices shall be governed by the laws of France.
>
> 23.2 In the event of any dispute or difference arising out of or relating to this Agreement or the breach thereof, . . . [such] disputes or differences shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with such rules. The site of the arbitration shall be Paris (France). (ER 226-27, Tab 10)

The agreements were executed in counterparts in Geneva, London and Paris. (ER 229, 271, 284-85, and 307, Tab 10).

C. The "Put" and Subsequent French Litigation

In March 1994, petitioners exercised their right to "put" their remaining De Carbon Company stock to DPOC. A dispute over the value of the company arose immediately, triggering the contractual price-setting process. Then disputes arose over the process itself, leading to a tangle of legal proceedings in France. Indeed, petitioners did not sell those "put" shares to DPOC, pursuant to the order of the ICC Arbitration panel in Paris (ER 651-84, Tab 10; AERJN, Ex. B), until October 1996 (five shares were escrowed by the District Court to preserve the Holding Company's standing to appeal, ER 1508-09, Tab 62; AERJN, Ex. B).

1. Petitioners Sue in Louviers to Have A Third Evaluator Appointed

A June 1994 report by Banque Worms (Paris), petitioners' evaluator, valued De Carbon Company at about four times what DPOC's evaluator did, and claimed that De Carbon Company would have been worth even more, had GM and DPOC not (1) misappropriated certain De Carbon Company technology, (2) caused De Carbon Company to sell products to DPOC at favorable prices (a so-called "price reduction"), and (3) failed to make good on promises to develop the American automobile market for De Carbon Company. (ER 193, Tab 9; ER 354-69, Tab 10)

These allegations were and remain the essence of petitioners' claims.

Petitioners then petitioned the Commercial Court of Louviers to appoint a third evaluator. That petition was initially rejected, but in January 1995, the Rouen Court of Appeals appointed M. Harmand as the third evaluator. On June 6, 1995, M. Harmand valued De Carbon Company at a price much closer to DPOC's than to petitioners' evaluator's. (ER 196-97, Tab 9; ER 372-462, Tab 10) Under the pricing mechanism petitioners had agreed to, this resulted in a valuation that disappointed petitioners. (ER 198-99, Tab 9; ER 671, Tab 10)

2. DPOC Commences an ICC Arbitration in Paris

In October 1994, after petitioners filed suit in Louviers, DPOC invoked the Supplemental Shareholder Agreement's arbitration clause, submitting to ICC Arbitration in Paris whether the Banque Worms evaluation was a "fair value" assessment of De Carbon Company's worth. (ER 195, Tab 9, ER 512-31, Tab 10) Petitioners filed the equivalent of cross-complaints in December 1994. (ER 136, Tab 9, ER 532-563, Tab 10). That filing once again argued that De Carbon Company, and therefore petitioners' stock, had been devalued by DPOC's allegedly unlawful transfer of technology, the so-called price reduction and the supposed failure to exploit North American market opportunities. (*Id.* at ER 540-43, Tab 10) However, petitioners did not formally advance damages cross-complaints based on these acts. The arbitration panel's "Terms of Reference," which determined the scope of that

arbitration, therefore did not include damages claims. (ER 1177-78, Tab 36)

Petitioners later regretted this. In September 1996, they tried to raise damages claims in arbitration – the same claims they brought to California.[3] They were denied permission, however, because they had not done so before the Terms of Reference were set in May. (ER 1177-78, Tab 36) (Petitioners are free to seek damages in a new arbitration, but, although the District Court directed them to arbitration, instead have pursued their delaying tactics. (ER 1178-80, Tab 36; pp. 9-10, below))

The ICC Arbitration nonetheless considered at great length petitioners' claims about the technology transfer, the price reduction, and the North American opportunity. Indeed, the arbitrators considered reports from two experts appointed in a third proceeding (see below) on those subjects. However, the arbitration did not improve petitioners' position. The arbitrators' July 1996 decision, with due regard to the court-appointed third evaluator's findings (pp. 5-6, above), set the same price he had. (ER 198-99, Tab 9; ER 651-84, Tab 10)

3. Petitioners Sue to Have an "Administrator" Consider Their Complaints

In February 1995, petitioners successfully petitioned the Louviers court again, this time for the appointment of an "administrator" to evaluate the price reduction, the

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[3] Petitioners argued that their damages claims were subject to arbitration under the Pre-Acquisition Agreement. (ER at 605-06, 610-11, Tab 10)

technology transfers and whether DPOC committed any other possible frauds or abuses. (ER 197-98, Tab 9) The administrator (M. Langlais) appointed two experts to take evidence and report on the technology transfers and price reductions. But once again, petitioners' claims were rejected. In July and November 1996, M. Langlais' preliminary reports found (based in part on M. Bonet's, an intellectual property expert's, opinions) that the technology transfers were effective and (based on M. Blois', an accounting expert's, opinion) that the price reduction was well-justified. (ER 199-200, Tab 9; ER 753-812, Tab 10) Accordingly, petitioners were denied relief.[4]

The net result of these three proceedings was that petitioners did not get the price for their shares they wanted, but were obligated to transfer them to DPOC at the 38 million FRF price established in the proceedings. Then just as soon as the outcome was clear in France, petitioners filed this suit in the Northern District of California to avoid it. That is particularly offensive, because the French Court of Appeals sanctioned the De Carbons for their "abusive," "delaying tactics" in trying to avoid the French rulings in France. (ER 824, Tab 11)

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[4] In October 1997, M. Langlais' final report largely confirmed the experts' findings that the technology transfers were proper, the price reduction justified, and no other DPOC frauds or abuses occurred ("it would be paradoxical to call a parent company's attitude improper when, until proof to the contrary, it has ensured its subsidiary's survival by upgrading its production facilities and by providing it with North American outlets at a time when it was out of breath on the European market." (ER 810, Tab 10) (*see also*, ER 200, Tab 9; SER 24, Tab 1))

D. Proceedings Below

This complaint was filed December 30, 1996. Except for substituting U.S. legal labels for French legal theories, petitioners' U.S. case essentially repeats the French charges, and adds the damage claim they neglected to add – but remain free to arbitrate – in France.

The basic claim remained that respondents "raided the De Carbon Company of its trade secrets, know-how, and assets, all in derogation of the duties of loyalty that . . . [petitioners] owed as the controlling shareholder." (ER 8, Tab 1) (*see also* ER 18, 20-21, 29, Tab 1; ER 70, Tab 2) In fact, petitioners revealed at oral argument in the District Court that what they really seek is to have the damages they neglected to address – and still refuse to address – in their French claims in France addressed here. (*See* ER 1307, Tab 41: "the damages for the price reduction and the improper transfer of the technology have never been resolved by any court. We feel that this is a proper forum for that. . . . ")

Petitioners had clearly agreed to arbitrate those claims, however, and respondents moved to dismiss the complaint on that ground, among others. The District Court's order granted respondents' motion on these grounds (Peti. Br., p. A-14):

(1) All appellants' underlying claims were arbitrable pursuant to the Federal Arbitration Act under the arbitration clauses signed by appellants selecting arbitration in France;

(2) All claims against De Carbon Company were dismissed for lack of personal jurisdiction; and

(3) All derivative claims were dismissed for failure to join De Carbon Company, an indispensable party to all derivative claims.[5]

The petitioners then appealed the District Court's order to the Ninth Circuit. Petitioners had, however, made affirmative claims in the District Court that had and have not been resolved. This was, therefore, an "embedded proceeding." Pp. 11-12, below. Therefore, as a long line of authority holds, the appeal was interlocutory, not final, and accordingly the Ninth Circuit dismissed the appeal for lack of jurisdiction. (*See* Peti. Br., p. A-19.)

II. ARGUMENT

The Federal Arbitration Act, 9 U.S.C. § 16(a) and (b), provides for appeals from orders regarding arbitration. Petitioners allege a "deep split" in the circuits regarding the application of 9 U.S.C. § 16(b) to orders directing arbitration in an "embedded" proceeding. But there is no deep, or really any, substantive split. The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all agree to the fundamental, and dispositive, principle: an order directing arbitration in an "embedded" proceeding is not final and therefore not appealable because it is an intermediate step in an action, not the final determination of one. (Part A, below)

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[5] Appellees also moved on *forum non conveniens* grounds, given the overwhelmingly French nature of this dispute, and the proceedings already underway there (ER 841-59, Tab 13). The District Court did not rule on this motion.

Petitioners try to fashion a mini split where no real split exists by pointing to the label sometimes placed on the order. A few circuits, petitioners point out, find that an order directing arbitration in an embedded proceeding but labeled "dismissal" is appealable, while the same order labeled "stay" is not. That is a classic distinction without a difference, and the micro issue it presents is not worthy of this Court's attention. (Part B, below) Indeed, to the extent that micro issue relates to the real world at all, a party can avoid it with no trouble at all. (Part C, below) Moreover, this Court has clearly defined the finality standard, the Ninth Circuit's disposition of this appeal squarely accords with it, and there is no occasion or reason for this Court to define the standard again. (Part D, below)

A. Ten Circuits Agree On the Fundamental Principle

Where one party seeks to compel arbitration and the other to avoid it, and "the only issue before the court is . . . [a] dispute's arbitrability," the proceeding is "independent." *McDermott Int'l Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 746-47 (5th Cir.), *cert. denied*, 508 U.S. 951 (1993); *see also Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 770 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994). Where, on the other hand, "one party or the other seeks some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable dispute)," a motion to compel arbitration is "embedded" with the claims seeking that other

relief. *Gammaro*, 15 F.3d at 95 (quoting *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993)); *see also Altman Nursing, Inc.*, 84 F.2d at 770-71.

Here petitioners brought suit on various claims, and prayed for relief on the merits of them. Respondents defended, on the ground, among others, that the dispute was arbitrable, and moved to dismiss on that ground. Accordingly, that motion was "embedded" with petitioners' claims on the merits, so this was an embedded, not independent, proceeding. No one claims otherwise.

The First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits distinguish independent from embedded proceedings. All subscribe to this fundamental principle: an order directing arbitration in an embedded proceeding is not final and so is unappealable. The reason is that that order is subject to further review, and is simply an intermediate step in the proceeding, not a final determination of the full relief sought on the merits.[6]

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[6] *Seacoast Motors of Salisbury, Inc. v. Chrysler Corporation*, 143 F.3d 626, 628 (1st. Cir. 1998) ("The general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefor not immediately reviewable, if the arbitrability issue is 'embedded' "); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1211 (7th Cir. 1998), *application for cert. pending*, No. 98-297 ("We consistently have . . . declined to find jurisdiction over appeals from arbitration orders in embedded proceedings"); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997), *application for cert. pending*, No. 97-1895 ("[I]f the motion to compel arbitration is 'embedded' in a substantive suit pending before the court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and

The reasons are obvious:

1) the merits of the underlying claims have not been addressed, let alone finally decided, *see* Dist. Court Order, Peti. Br. p. A1-14; *Zosky*, 856 F.2d at 559;

2) the initial order compelling the arbitration is subject to review after arbitration is completed and a final order is entered, *McCarthy*, 122 F.3d at 1245; *Napleton*, 138 F.3d at 1215; *Zosky*, 856 F.2d at 559;

3) the arbitration award itself is subject to further review by the District Court, *id.*; *see also* 9 U.S.C. §§ 9 (confirmation of the award), 10 (vacation of award), 11 (modification or correction of the award);

4) petitioners may be satisfied with the arbitration award, thus avoiding any further review or appeals; so

5) the rule prevents piecemeal appeals, "favor[s] arbitration over litigation," *American Cas. Co.*, 35 F.3d at 135, permits the arbitration proceeding to "run its course," *McCarthy*, 122 F.3d at 1245, is generally "the most economical approach," *Napleton*, 138 F.3d at 1214, and "corresponds with the Act's purpose of promoting greater use of arbitration," *Id.*, citing *McCarthy*, 122 F.3d at 1245.

The "deep split" among the circuits that petitioners base their petition upon obviously does not exist.

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therefore not reviewable"); *Altman Nursing, Inc.*, 84 F.3d at 771 ("The appropriate test of finality is whether the order involved an independent or embedded proceeding. An order involving an embedded proceeding is always an interlocutory order"); *Gammaro*, 15 F.3d at 95 ("The action before us is a typical example

B. Petitioners' Mini Split On a Micro-Issue Is Not Grounds for Review

Petitioners do not speak to, let alone challenge, the virtually uniform endorsement of the fundamental principle precluding appeal of an order directing arbitration in

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of an embedded proceeding, and under the construction of section 16 we adopt today, we are therefore without jurisdiction to hear this appeal"); *American Casualty Co. of Reading, Pennsylvania v. L-J, Inc.*, 35 F.3d 133, 136 (4th Cir. 1994) ("[A]n order compelling arbitration 'in an embedded proceeding' . . . is a nonappealable interlocutory order, 'even when all the claims in which the arbitration issue is embedded are resolved by that order' "); *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) ("[A]n order can only be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the district court"); *Filanto*, 984 F.2d at 60 ("If the suit is 'embedded,' i.e., a party has sought some relief other than an order requiring or prohibiting arbitration . . . orders directing arbitration are not immediately appealable"); *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) ("[O]rders granting or denying requests to compel arbitration are not final decisions if entered in the course of ongoing actions for legal or equitable relief on the underlying claims"); *Zosky v. Boyer*, 856 F.2d 554, 559 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) ("[O]rders [compelling arbitration] arising out of a law suit 'such as a suit for damages' are interlocutory and not appealable as final orders") (Citations omitted throughout).

Arnold v. Arnold Corp. Printed Communications for Bus., 920 F.2d 1269, 1273-76 (6th Cir. 1990), remarks that a 1988 amendment to § 15 of the Arbitration Act undercuts the "embedded" rule, but the Act does not say that, and no case has followed that dictum. Moreover, in *Arnold* the Court's order directing arbitration was a "dismissal," not a "stay," and on analysis *Arnold* turned on that supposed distinction. *See Altman*, above, 84 F.3d at 771; pp. 15-17, below.

an embedded proceeding. Instead, petitioners point to three circuit court cases holding that such an order is appealable if labeled "dismissal" rather than "stay." (Part B(1), below) Those aberrational cases are ill-reasoned, and they elevate form over substance. Therefore, the better-reasoned authority, including the Ninth Circuit in this case, holds otherwise. (Part B(2), below) But this mini split need not be resolved in any case, because it presents a nonissue; the labeling problem that gives rise to that nonissue, even assuming it otherwise mattered, can be easily avoided and readily solved. (Part C, below)

1. The Three Cases Turning On Labels

Petitioners point to three cases holding that an order directing arbitration in an embedded proceeding is appealable if labeled "dismissal" rather than "stay." The first two, *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991), and *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995), are truly aberrations, even in their own circuits.

Thus *Nationwide*, from the Third Circuit, relies upon *Zosky*, 856 F.2d at 557-59, also from the Third Circuit, stating:

> [In *Zosky* the Third Circuit] reaffirmed our precedent that "an order requiring arbitration is appealable as final . . . 'where it is not merely a step in the judicial enforcement of a claim, not auxiliary to the main proceeding but is the full relief sought. . . . Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief.' "

Nationwide, 953 F.2d at 46 (quoting *Zosky*, 856 F.2d at 557). *Nationwide* goes on to find, without explanation, that an order compelling arbitration in an embedded proceeding labeled "dismissal" is "appealable as final." *Id.* at 46. *Zosky*, on which *National* relies for that holding, is directly at odds with it. *Zosky* makes clear that finality depends upon whether the underlying proceeding is independent or embedded, not on words: "The rule [that an arbitration order in an ongoing proceeding is not appealable] serves the purpose of preventing piecemeal appeals and *minimizes the degree to which appealability depends on the mere form of the order.*" *Id.* at 559-60; emphasis added.

Likewise, *Armijo*, from the Tenth Circuit, relied upon *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994), from the Tenth Circuit. *Adair*, however, held "that an order can *only* be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the District Court." *Id.* at 955; emphasis added. *Armijo* is directly at odds with that holding; for notwithstanding that arbitrability was not "the sole issue before the District Court," *Armijo* held without explanation that the District Court's order labeled dismissal was nonetheless appealable.[7]

Petitioner's third case, *Arnold v. Arnold Corp. Printed Communications for Bus.*, 920 F.2d 1269 (6th Cir. 1990), cites

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[7] *Armijo* simply observed that since there is "no evidence in the record of any request for a stay [under 9 U.S.C. § 3]. . . . the district court's order granting [appellee's] motion to compel arbitration and to dismiss Plaintiff's claim was clearly a final order." *Armijo*, 72 F.3d at 797.

to legislative history, but ultimately also turns on labels: The District Court order compelling arbitration dismissed the embedded action instead of staying it. *Id.* at 1275-76; n.5, above.

2. The Principled Resolution

Petitioners' three cases are out of line, because they ignore the fundamental principle: It "is the nature of the underlying action, not the style of the District Court's decision requiring arbitration, that determines whether . . . [an appellate court] has jurisdiction over appeals from decisions granting arbitrations." *See, e.g., Napleton*, above, 138 F.3d at 1212 (holding dismissal order directing arbitration in embedded case not appealable). To put it another way, determining an order's appealability based on its underlying, embedded, substance, not labels, "avoids elevating form over substance. . . . " *Seacoast Motors*, above, 143 F.3d at 629.[8]

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[8] There is no substantive difference between an order directing arbitration labeled dismissal and a like order labeled stay. In both, the party opposing arbitration simply must arbitrate. If, after arbitration, the party is dissatisfied with the result, in both cases he may return to the district court, and obtain exactly the same review in the district court and the Court of Appeal, including "review of the district court's order compelling arbitration," *McCarthy*, 122 F.3d at 1245; *Napleton*, 138 F.3d at 1214, plus, if warranted by the district court's review, disposition of the merits of his claim. That is another reason why the order is nonappealable, "[t]he requirement of finality precludes consideration of decisions that are subject to revision." *Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996); pp. 20-21, below.

The trial court directed arbitration in this embedded proceeding, and dismissed it. The Ninth Circuit followed *McCarthy*, the fundamental principle, and the overwhelming majority of circuit courts, and so held that ruling unappealable until the arbitration ran its course. That was also the right result. "[A]dherence to the demarcation between independent and embedded proceedings corresponds with the Act's purpose of promoting greater use of arbitration." *Napleton*, 138 F.3d at 1214.

C. In Any Case, This Nonissue Is Easily Avoided

But all of this is much ado about nothing. The fundamental principle holds that an order directing arbitration in an embedded proceeding is nonappealable. That principle is embraced by virtually all circuits. A party moving to compel arbitration in a circuit which distinguishes an order labeled dismissal from an order labeled stay can ensure that the fundamental principle governs, so the order is unappealable; all the party need do is to seek a stay, not a dismissal. He would certainly be entitled to that stay if he applied for it: 9 U.S.C. § 3 provides that a

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Petitioners advise that "the difference between a stay and a dismissal is significant" because of some supposed "statute of limitation dangers." Peti. Br. p. 12, n.12. But the sole authority they cite, *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 222-23 (1966), creates no such danger here, and we know of no authority that does. To the contrary, §§ 9, 10, 11 and 207 of the Act permit a party to attack an arbitration award for a year after it is rendered and, in an international arbitration, three years; that rule is the same whether the arbitration proceeds with or without a court order directing it, and regardless whether such an order, if it exists, is labeled dismissal or stay.

District Court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[9]

That, we submit, is all there is to this manufactured problem. There is no dire need to solve it; it is a non-problem. Indeed, were this Court to grant review and, upon review, embrace the minority position and hold that a "dismissal" in an embedded proceeding is appealable, while a "stay" is not, litigants in all circuits moving to compel arbitration would simply adapt to the ruling; accordingly, thereafter they would move only for stay orders, not dismissals, under 9 U.S.C. § 3. That would ensure that the fundamental principle still governed, so the orders would remain unappealable. Therefore, after the significant investment of this Court's time to hear and decide the case, nothing substantive would change. That is as it should be with rules that elevate form over substance. Substance prevails in the end.

We repeat: This is a nonproblem, and there is no reason to impose on the Court's time to solve it.

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[9] If the district court denied the stay, that would be reversible error. *Armijo*, 72 F.3d at 797, discussing *Adair*, 25 F.3d 953. If the party moving to compel sought dismissal, not a stay, the party resisting arbitration could seek one; 9 U.S.C. § 3 gives that right to either party. Of course, if both parties acceded to dismissal and neither sought a stay, each would have got what he wanted and neither would have anything to complain about. *See Armijo*, 72 F.3d at 797.

D. The Ninth Circuit's Ruling Squarely Accords With This Court's Clear Finality Standard

The Ninth Circuit's ruling accords with the fundamental principle endorsed by virtually all circuits. It also accords with this Court's clear, and fundamental, finality standard: A judgment must be final "in two senses: it must be subject to no further review or correction . . . ; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Jefferson v. City of Tarrant*, 118 S. Ct. 481, 485-86 (1997) (*quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).[10] *Accord, Behrens v. Pelletier*, above, 116 S. Ct. 834, 838 (1996):

> Section 1291 of Title 28, U.S.C. gives courts of appeal jurisdiction over "all final decisions" of District Courts, except those for which appeal is to be had to this Court. The requirement of finality precludes consideration of decisions that are subject to revision, and even of "fully consummated decisions [that] are but steps towards final judgment in which they will merge."[11]

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[10] *Jefferson* arose under 28 U.S.C. § 1257, which governs this Court's review of final decisions of state courts of last resort.

[11] A decision not final under the general standards is not final under 9 U.S.C. § 16; petitioners' claim that § 16 and 28 U.S.C. § 1297 are at odds is wrong. *See Altman Nursing, Inc.*, 84 F.3d at 771-72:

> "Final decision" is a legal term of art traditionally used to distinguish appealable and nonappealable lower court decisions under 28 U.S.C. § 1291 – the general provision governing appellate jurisdiction. Judicial decisions have given meaning to the term of

This District Court's original order directing arbitration was subject to "further review and correction" in the District Court after the arbitration had run its course (p. 13, above), and so was but a "step towards final judgment." The arbitration award itself was subject to review and correction in the District Court once rendered. *Id.* Also the District Court would have to determine the merits of the "embedded" claims, if that were called for either by its ruling on its original order directing arbitration or its ruling on the arbitration award itself. Then the District Court's decision – after the arbitration was completed – as to all those matters would in turn be subject to review and correction in the Court of Appeal. 9 U.S.C. § 16(a)(3).

Therefore, the Ninth Circuit's no-finality ruling squarely accords with this Court's finality standard. There is no occasion for this Court to revisit that clear standard, or articulate it again, and certainly not in this forum shopping case.

> art. Section 16 does not define the term "final decision," nor does it indicate an intent to change the preexisting judicial interpretation of this term of art. As such, we can assume that by using a term of art Congress intended to retain its preexisting meaning. Moreover, [as] section 16 uses very specific language to change the prior law regarding the appealability of interlocutory decisions disfavoring arbitration, 9 U.S.C. § 16(a)(1)(A-C), it seems that Congress would have been equally specific if it had intended to change the preexisting interpretation of "final decision."

(*quoting Perera v. Seigel Trading Co.*, 951 F.2d 780, 783-84 (7th Cir. 1992)).

III. CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 98-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STEPHANÉ BOURCHIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION
DES ACTIONS DE CARBON,

Petitioners,

v.

GENERAL MOTORS CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

INTRODUCTION

Respondents in their Brief in Opposition ("BIO") unleash a flurry of irrelevant misstatements in the vain hope of diverting the Court's attention from the issue before it. We address those misstatements below. But most important for the Court's purposes is that respondents cannot and do not dispute that this case is an appropriate vehicle to resolve the question presented. The district court dismissed petitioners' complaint *with prejudice*. Pet. App. 9a. The Ninth Circuit held the order of dismissal was non-appealable, *id.* 19a; three other circuits have reached the opposite conclusion and recognized such an order for what it is: a final and appealable disposition of the case. Four separate Petitions presenting the question now are pending here (Pet. at i; No. 97-1895, *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); No. 98-279, *Napleton v. GMC*, 138 F.3d 1209 (7th Cir. 1998); No. 98-415, *Seacoast Motors v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998)[1]), and this Court should grant certiorari to resolve the conflict.

Respondents cobble together some excerpts from this case's procedural history, and manufacture still others, to contend that petitioners are engaged in "forum shopping." Thus, respondents assert that petitioners "have litigated" their claims "in France for years" but "did not succeed on the merits." BIO at 2. That assertion is false: respondents have succeeded in preventing *any* French tribunal from *ever* ruling

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[1] Petitioners in this case and *Seacoast Motors* are represented by joint counsel. To the extent the Court has concerns regarding which of the four Petitions presents the best vehicle to resolve the question presented (an issue that is discussed in the *Seacoast Motors* Petition (at 5-9)), we recommend that the Court grant certiorari in both this case and *Seacoast Motors* and consolidate the two cases. *Cf. Muscarello v. United States and Cleveland v. United States*, Nos. 96-1654 and 96-8837, 118 S. Ct. 191 (1998). We also recommend that the Court direct the parties to brief the appealability of an order of dismissal under *both* 9 U.S.C. § 16 and 28 U.S.C. § 1291. *See* Pet. for Cert., *Seacoast Motors v. Chrysler Corp.*, at 8 & n.3.

on the merits of petitioners' claims. (ER 970, Tab 26.) Respondents did so by arguing that "the arbitration panel *does not have jurisdiction* [to address Petitioners' tort claims], because the [parties' arbitration clause] deals only with the disputes that arise out of the [contracts containing the arbitration clause] *and nothing else*." (ER 1204, Tab 39 (emphasis added).) Respondents' argument was accepted by the International Chamber of Commerce (the body that governs the arbitration), as well as three French courts, including the Supreme Court of France. (ER 683, Tab 10; ER 1018, Tab 26, Appellants' Request for Judicial Notice, Ex. B, at 4.) Petitioners therefore had no choice but to pursue the merits of their U.S. law claims in the U.S. courts. That is not "forum shopping."

I. THE CIRCUITS ARE DIVIDED IRRECONCILABLY OVER THE QUESTION PRESENTED.

Respondents cannot deny the deep split among the circuits over the question presented. Respondents are correct that the circuits uniformly have recognized a distinction between "embedded" and "independent" actions; but that point is irrelevant: *within* the class of embedded actions, the circuits have divided five to three over whether a party may appeal an order of dismissal. The objective proof of this conflict is that *all* of the circuits that refuse to find appellate jurisdiction in these circumstances acknowledge that other courts of appeals reach the opposite conclusion. *See Seacoast Motors*, 143 F.3d at 628 (acknowledging that Third, Sixth and Tenth Circuits "have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded"); *Napleton*, 138 F.3d at 1212 (7th Cir.) (2-1 decision) (acknowledging that "[b]oth the Tenth and Third Circuits have held that a dismissal in favor of arbitration is an appealable decision, even in an embedded proceeding"; citing also *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)); *McCarthy*, 122 F.3d at 1243-45 (9th Cir.) (2-1 decision) ("*But see*" citation to decisions of Sixth and Tenth

Circuits); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769, 770-72 (5th Cir. 1996) (rejecting Sixth Circuit's decision in *Arnold*); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994) ("*But see*" citation to *Arnold*). In addition, forceful dissents in the Seventh and Ninth Circuits advocated the contrary rule applied by other circuits. *Napleton*, 138 F.3d at 1216 (Wood, J., dissenting) ("Like my colleagues in the Tenth and Sixth Circuits, however, and like the dissenting judge in the Ninth Circuit decision on which the majority relies so heavily, I see nothing in § 16(a)(3) that justifies such a reading."); *McCarthy*, 122 F.3d at 1248 (Pregerson, J., dissenting) ("[T]he Sixth and Tenth Circuits have held that, where the district court dismisses the action upon ordering arbitration, the order is an appealable final decision."). For its part, the Seventh Circuit denied rehearing *en banc* in *Napleton* only by a five-to-five vote, with Chief Judge Posner, and Judges Easterbrook, Cummings, Rovner, and Wood dissenting.

Respondents acknowledge a square conflict with the Sixth Circuit's decision in *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (*see* BIO at 16-17), but attempt to disclaim a conflict with the Third and Tenth Circuits. According to respondents, the Third and Tenth Circuits have applied their *own* prior circuit precedents incorrectly. But respondents' contention is entirely academic: not only have the Third and Tenth Circuits squarely addressed this question and found appellate jurisdiction on these facts; but in so doing, they considered *precisely* the cases on which respondents rely and concluded that those cases did not compel a different outcome.

Specifically, respondents do not deny that the Third Circuit addressed this exact question and found appellate jurisdiction in *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991). Respondents instead contend that *Nationwide Insurance* incorrectly distinguished *Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988), decided *before* the appealability sections of the Federal Arbitration Act (9 U.S.C. § 16) even took effect. The Third Circuit in *Nationwide Insurance* addressed *Zosky* at length and squarely held that it was not

controlling; the matter therefore is settled. But even if the Third Circuit's analysis of *Zosky* were relevant here, that analysis is correct. *Zosky* involved *not* a dismissal of a plaintiff's case but instead an order in which "[t]he magistrate *retains jurisdiction*." 856 F.2d at 559 (emphasis added). The court in *Nationwide Insurance* therefore correctly distinguished *Zosky* on the ground that "[h]ere, although the result of the district court's order is that the parties will arbitrate their dispute, the district court's dismissal of Nationwide's action plainly signifies that this arbitration *is not a part of any ongoing proceeding*." 953 F.2d at 46 (emphasis added).

Respondents also do not deny that in *Armijo v. Prudential Insurance Co.*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit squarely found that appellate jurisdiction exists on these facts. Respondents instead claim that *Armijo* improperly distinguished *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994). But the Tenth Circuit in *Armijo expressly* concluded that *Adair Bus Sales* did not compel a contrary conclusion, 72 F.3d at 796-97; that is all that matters here. There is, moreover, a clear conflict between the decision below, in which the Ninth Circuit left the district court's order of dismissal with prejudice in place, and *Adair Bus Sales*, in which the Tenth Circuit vacated and remanded the district court's dismissal of the plaintiff's complaint and instructed the district court to enter a stay (25 F.3d at 955-56).[2] As we explain below, a stay differs substantially from a judgment of dismissal.

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[2] *Armijo* limits *Adair Bus Sales* to cases in which the district court *sua sponte* dismisses the complaint rather than imposing a stay as requested by the defendant. 72 F.3d at 797.

II. THE QUESTION PRESENTED INVOLVES AN IMPORTANT AND FREQUENTLY RECURRING QUESTION OF FEDERAL LAW.

Respondents claim that the question presented here is unimportant and rarely arises. That is demonstrably wrong. Questions about the basic right of aggrieved litigants to appeal error and the power of appellate courts to correct it are fundamental to due process. These questions are no less important when applied to the dismissal of a civil action when a district court (as here) wrongly concludes that a party has submitted its claims to arbitration, thereby effectively waiving its First and Seventh Amendment rights of petition and trial by jury.

In more than a dozen cases in the past year alone, district courts have dismissed the plaintiff's complaint in favor of arbitration, thereby directly implicating the conflict among the circuits.[3] Even now, the appealability of such a dismissal is pending before both the Second and Eleventh Circuits. *See Goldberg v. Merrill Lynch*, 2d Cir. No. 98-7955 (appeal from 1:97cv08779 (S.D.N.Y.)), Docket Entry (argument set for "as

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[3] *Talegen Holdings v. Fremont Gen. Corp.*, No. 98-Civ.-0366, 1998 U.S. Dist. LEXIS 12805 (S.D.N.Y. Aug. 19, 1998); *Goldberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 97-Civ.-8779, 1998 U.S. Dist. LEXIS 8906 (S.D.N.Y. June 18, 1998); *Pelegrin v. United States Filter Corp.*, No. 97-390-SLR, 1998 U.S. Dist. LEXIS 5332 (D. Del. Mar. 31, 1998); *UPS v. International Brotherhood of Teamsters, AFL-CIO*, 999 F. Supp. 70 (D.D.C. 1998); *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410 (M.D. Ala. 1998); *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1998); *Merchant v. Weissman*, No. 97-C-2205, 1997 U.S. Dist. LEXIS 17772 (N.D. Ill. Nov. 5, 1997); *Lopez v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, No. 97-C-3407, 1997 U.S. Dist. LEXIS 16921 (N.D. Ill. Oct. 28, 1997); *Clayton v. Woodmen of the World Life Ins. Soc'y*, 981 F. Supp. 1447 (M.D. Ala. 1997); *Murillo v. Allstate Ins. Co.*, No. C-97-2431, 1997 U.S. Dist. LEXIS 16667 (N.D. Cal. Oct. 14, 1997); *Boyd v. Homes of Legend*, 981 F. Supp. 1423 (M.D. Ala. 1997); *Valdiviezo v. Phelps Doge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060 (Sept. 29, 1997); *Sellers-Raddish v. Paul, Hastings, Janofsky & Walker, LLP*, No. 3:97CV01117, 1997 U.S. Dist. LEXIS 21810 (D. Conn. Sept. 11, 1997).

early as week of 11/9/98"); *Randolph v. Green Tree Fin. Corp.*, 11th Cir. No. 98-6055, Motion of Appellees To Dismiss Appeal For Lack Of Jurisdiction, at 8-9 (citing *McCarthy*, *supra*; *Seacoast Motors*, *supra*; *Napleton*, *supra*). Moreover, given that four Petitions raising the question now are pending before this Court, the Court clearly has its best opportunity to resolve the conflict among the circuits.

Respondents separately claim this Court's intervention is not required to resolve the conflict among the circuits. According to respondents, litigants can avoid the effect of the conflict or the result of any ruling by this Court simply by requesting a stay of the action rather than dismissal of the plaintiff's complaint. Even at face value, this argument is irrelevant: no matter what litigants hypothetically *could* do, district courts now *in fact* frequently dismiss plaintiffs' complaints pending arbitration. *See supra* note 3. In three circuits, those plaintiffs may immediately appeal; in five other circuits, they may not. The main purpose of the Court's modern certiorari jurisdiction is to resolve such a conflict.

Moreover, respondents are wrong on the law. Citing *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994), respondents assert that a district court *must* enter a stay, rather than a dismissal, if a party requests only a stay under Section 3 of the Federal Arbitration Act. BIO 18-19 & n.9. Respondents fail to advise the Court, however, that on this question *Adair Bus Sales* is at the bottom of a one-to-four split in the circuits. The substantial majority rule (including in the Ninth Circuit, in which this case arose) is that a stay is *not* required: "If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it." *Seus v. John Nuveen & Co.*, 146 F.3d 175, 179 (3d Cir. 1998); *see also Bercovitch v. Baldwin School*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

III. THE DECISION BELOW IS ERRONEOUS.

Certiorari also is warranted because the decision below is erroneous. The district court compelled arbitration and dismissed petitioners' complaint with prejudice. Pet. App. 9a. Respondents contend the district court's ruling therefore was a non-appealable order "compelling arbitration under section 206 of this title." *See* BIO at 3, 17-18 (discussing 9 U.S.C. § 16(b)(3)).[4] But Respondents ignore the full text of the statute, which distinguishes between final and interlocutory orders. The provision on which Respondents rely, 9 U.S.C. § 16(b)(3), states in full: "an appeal may not be taken from an *interlocutory order* . . . (3) compelling arbitration under section 206 of this title" (emphasis added). By contrast the statute provides unambiguously that "[a]n appeal *may* be taken from – . . . (3) a *final decision* with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3) (emphasis added).

It is no accident that the statute clearly distinguishes between final and interlocutory orders. Congress added Section 16 to the Federal Arbitration Act in 1988 to clarify the appealability of district court orders regarding *interlocutory orders* regarding arbitration. *See generally* Richard J. Medalie, *The New Appeals Amendment: A Step Forward For Arbitration*, 44 ARBITRATION J. 22 (1989).[5] Section 16 was *not*

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[4] Respondents assert that because the district court in this case compelled international arbitration, its order fell within section 206, not section 4, of the Federal Arbitration Act. BIO at 3 n.2. As a result, respondents contend, this appeal is governed by 9 U.S.C. § 16(b)(3), not § 16(b)(2). Petitioners cited § 16(b)(2) because it was the provision invoked by the Ninth Circuit in the ruling below. *See* Pet. App. 19a. In any event, it makes no difference which provision is relied upon, and respondents do not contend otherwise. At bottom, the question presented is whether the district court's order was "final" and appealable or instead "interlocutory" and non-appealable. *See infra*. The analysis of that question is the same under either provision.

[5] Under this Court's *Enelow-Ettelson* doctrine, the appealability of interlocutory orders turned on whether the underlying suit was in law or equity. *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). Even after the Court

intended to modify the established rule that final decisions, including particularly orders of dismissal, were appealable, as the Judiciary Committee's Section-By-Section Analysis explains:

> Moreover, under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, *or a final judgment dismissing an action in deference to arbitration*. These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court.

134 Cong. Rec. S16284, S16309 (Oct. 12, 1988) (emphasis added).

The district court's order in this case was final. "The requirement of finality precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996).[6] Here, the district court dismissed petitioners'

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overturned the doctrine in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the circuits divided over the appealability of orders respecting arbitration. *Compare Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420 (4th Cir. 1988) (appeal permitted from order refusing to compel arbitration) *with Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169 (5th Cir. 1988) (no appeal permitted from denial of stay pending arbitration) *and Steele v. L.F. Rothschild & Co.*, 864 F.2d 1 (2d Cir. 1988) (no appeal permitted from stay pending arbitration). Congress resolved that conflict by adopting Section 16.

[6] Respondents inexplicably invoke the distinct and more stringent test for determining whether a state court has issued a "final judgment" under 28 U.S.C. § 1257. BIO at 20 & n. 10. Section 1257 has nothing to do with this case and that test is inapplicable in this context. "For purposes of more explicit comparison, it should be plain that *decisions in one area cannot be binding precedent in the other*." Robert L. Stern et al., *Supreme*

complaint with prejudice, and expressly declared its order to be "final." Pet. App. 9a, 16a. There is nothing more to be done in the district court, which permanently has divested itself of jurisdiction over the case. The district court also unquestionably believed that its "final" order was appealable, as it expressly conditioned its dismissal of petitioners' complaint on an agreement by respondents to maintain the status quo pending appeal. Pet. at 7.

Respondents rely on the rationale of those circuits that have concluded that it "is the nature of the underlying action, not the style of the District Court's decision requiring arbitration, that determines whether [an appellate court] has jurisdiction over appeals from decisions granting arbitrations." BIO at 17 (quoting *Napleton*, 138 F.3d at 1212). The statute, however, compels precisely the opposite conclusion. There is no textual support for drawing a distinction based on "the nature of the underlying action": in particular, the statute does not recognize the distinction drawn by respondents and the Ninth Circuit between embedded and independent actions. To the contrary, Section 16 unam-biguously turns on "the style of the District Court's decision": "final" decisions are appealable; "interlocutory" orders are not. *Compare* 9 U.S.C. § 16(a) *with id.* § 16(b).

Ultimately, then, respondents' argument turns on their insupportable assertion that "[t]here is no substantive difference between an order directing arbitration labeled dismissal and a like order labeled stay." BIO at 17 n.8. When a stay is imposed, the district court retains jurisdiction, and parties may move to lift the stay and seek additional relief. Here, by contrast, the case is closed permanently. For petitioners, this means a dead end. Thus, the district court compelled arbitration of petitioners' U.S. law claims despite the fact that those claims are not subject to arbitration and arise

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Court Practice § 3.4, at 95 n.9 (7th ed. 1993) (quoting 15A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3908, at 290 (2d ed. 1992)) (emphasis added).

between non-parties to the arbitration clause. Yet the French appellate courts already have declared that, under French law, this dispute between these parties is *not* arbitrable. Those rulings would bind the French tribunals if petitioners were to return there now. Petitioners could not thereafter appeal the arbitrators' refusal to assert jurisdiction to the United States courts because French law provides that petitioners can only appeal the French arbitrators' decision to the French courts. French New Code of Civil Proc., Art. 1505 (1996 ed.). Thus, unless a U.S. court reviews the district court's decision now, petitioners will lose their right to pursue their U.S. law claims without ever having received an opportunity to present those claims to any court, anywhere.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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